WRITTEN LAW

THE SECURITY and HAPPINESS OF A FREE STATE:

ADDRESSED TO

All ſuch Perſons as are liable to ſerve on Juries.

Pro Rege, et Lege.

LONDON:
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To all ſuch Perſons as are liable to ſerve on Juries.

GENTLEMEN,

THE following Eſſay is reſpectfully offered to Your Peruſal; and is publiſhed with an Intention to point out the Neceſſity which there is, That they whoſe Province it is to adminiſter Juſtice in our Courts of Common Law, and of Criminal Judicature, ſhould adhere ſtrictly to the Law in all their Determinations. For this Purpoſe I have attempted to explain the particular Miſchiefs which muſt neceſſarily ariſe to the Public, if Men ſo intruſted ſhould depart from the Law, and ſhould adminiſter what may appear to them to be eſſential Juſtice, in any of thoſe diſputed Matters which they are occaſionally called upon to decide. I flatter myſelf with a Hope, that the Opinions here laid down will be thought worthy Your Conſideration; but, if they ſhould not, I ſhall ſtill be happy in a Conſciouſneſs that the Publication of them proceeded from Motives which I am well aſſured You approve.

I am, GENTLEMEN,

Your Fellow-Citizen, and

moſt obedient Servant,

November, 1776.

THE AUTHOR.

WRITTEN LAW, &c.

IT is eſſential to a free ſtate, that life, liberty and property, ſhould, in no inſtance, be held at the will of any particular man, or ſet of men; but that all matters relative thereto ſhould be adjudged by known and written Laws. In ſuch a ſtate, therefore, the determinations of their Courts of Juſtice muſt be controled by the apparent intention of the Law-makers, expreſſed by the letter of thoſe Laws; and no idea of eſſential juſtice muſt be called in aid to ſupply any defects which may exiſt, or may be ſuppoſed to exiſt in them.——Should a licence of that kind be on any occaſions allowed by a free people, no line can be drawn; the wild field of opinion will be open to their judges, and fancy and faſhion will decide their rights. To criminal, as well as to civil caſes, the miſchief will extend itſelf; and the tenure by which they will hold their moſt valuable poſſeſſions will be precarious and dependent: litigation will come forth in new and various forms; and inconſiſtency, uncertainty and confuſion, will riot in their Courts.

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I have little reaſon to think that the opinions here laid down, conducive as they are to the happineſs and freedom of the community at large, will be at firſt ſight ſupported by the general aſſent of mankind. The paragraphs frequently to be found in news-papers relative to theſe matters, are alone ſufficient to convince me that they will not: thoſe dealers in daily intelligence, however inaccurate they may often be in their publications of facts, are, for the moſt part, faithfull collectors of popular opinions; and a Gazetteer which I lately ſaw, after having ſtated a queſtion which came before one of our Courts of Common Law, and having ſet down the determination of the Court thereon, adds, " That the " deciſion of the Judge who preſided there, was *agreeable to the* " *equity and munificence which diſtinguiſh him as a Lawyer and* " *as a Man.*"——It is admitted, that the Judge there ſpoken of is highly reſpectable both as a Lawyer and as a Man; and it is preſumed, that he determined the queſtion *agreeable to his extenſive knowledge of the Law, and his unremitted ſteadineſs in adhering to it in all his determinations.* That being the caſe, his equity and munificence had no concern at all in the affair: but had it been otherwiſe, and had he departed from the Law, for the purpoſe of adminiſtering what might have appeared to

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him to be eſſential juſtice, he would have done wrong; and his equity and munificence would have been called forth on an improper occaſion.

I am led into this train of thought, not ſo much by the popular opinion above-noticed, as by many pleadings which I have heard, and by ſome determinations. I have heard alſo a learned Lord, in an auguſt Aſſembly, when a plain, well-known, and well-underſtood Rule of Law was inſiſted upon, ſet up in oppoſition to it the rule of right, and eternal fitneſs of things; and was concerned to ſee a Lawyer of high rank, thus convert himſelf into a Metaphyſician, and attempt, in ſuch ſenſeleſs and unmeaning terms, to explain away the Laws of a free country. Flowery expreſſions, flowing periods, a melodious voice, and well-adapted manner, may ſerve to captivate and convince the unlearned auditor; but are in no reſpect neceſſary to the inveſtigation of a point of Law.

When a point of Law comes to be agitated before a Court, the queſtion is, not, What is conſcientious and equitable; not, What is preciſely right or wrong; but what is Law: that is, What is the intent and meaning of the written Law, when applied to that caſe.——That the leaſt deviation from this mode of con-

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ſidering caſes ought, in no inſtances whatſoever, to be allowed of, has been and is the opinion of ſome of the moſt eminent perſons in the Profeſſion. I do not chuſe to take the liberty of mentioning the name of any learned Judge now on the Bench, but Mr. Baron Perrot, who has reſigned, and who will long be remembered and reſpected, has, on many occaſions, ſtood forth the Guardian and Vindicator of the Laws of his Country; and ever treated the new-fangled mode of conſidering Law-Caſes, as an abſurdity productive of the moſt miſchievous conſequences.

It muſt be admitted, that the Common Law, and Statute Law, founded as they are in juſtice, fraught with wiſdom, and adapted to the general purpoſes of good government, are, by no means, ſufficient to afford complete juſtice in every caſe that may happen to come before a Court of Law, or of Criminal Judicature. It does not, however, from thence follow, that thoſe Courts ought to depart from them in any of their determinations. No: if the caſe is of a criminal kind, and the Laws ſhould be found inſufficient, let the Culprit eſcape; and, if the Legiſlature ſhould think it expedient for the purpoſe of bringing to juſtice other perſons who ſhall offend in a ſimilar way, let a new Law

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be made *. If the Caſe is of a civil kind, let the ſame principle be preſerved: but let not an uncontroled power of determination be on any account endured; ſince, under ſuch circumſtances, litigation will every day encreaſe; no man will know what his rights are; every whimſical determination will be a precedent that will endanger his poſſeſſions; and of ſuch precedents there will of courſe be many. The weakneſſes of thoſe whoſe province it may be to adminiſter juſtice will come forth; their prejudices in reſpect to particular actions, their partiality to particular perſons, or, as it

* A queſtion which lately created much difficulty and difference of opinion amongſt the Judges, in the caſe of Mrs. Rudd: namely, Whether Sir John Fielding was, or was not, warranted by Law to admit her a King's Evidence? aroſe from the Juſtices of Gaol-Delivery having formerly departed from the Law, and having been for many years accuſtomed to accept, as King's Evidence, perſons ſo admitted by the Juſtices of Peace, contrary to, or without the ſanction of Law: and in this manner Mrs. Rudd was admitted. For nothing is more certain, than that the circumſtances of her examination did not entitle her to be admitted by any Rule of the Common Law, or by proviſion made in any Statute; but ſhe was admitted by virtue of this cuſtom, which had been ſo introduced by the Juſtices of Peace, and acquieſced in by the Juſtices of Gaol-Delivery: a cuſtom that conſiſts of proceedings which are founded in wiſdom, and which ought to have been formed into a Statute long ago; as all cuſtoms of that kind, being not warranted by Law, are in the higheſt degree improper, and muſt ever be productive of litigation, perplexity and confuſion, in our Courts of Juſtice.

may poſſibly happen, ſome political conſideration, may influence their deciſions; and what may appear to men ſo acted upon to be eſſential juſtice, may, in reality, be injuſtice of the moſt flagrant kind.

It may be further obſerved, that whenever it ſo happens that any ſet of men appointed to adminiſter juſtice in a Court of Common Law, or of Criminal Judicature, either as Judges or as Jurors, are not guided and controled in their determinations by the ſtrict rules of Law, they take upon themſelves, in ſome ſort, the office of legiſlation, and act contrary to a well-known and well-founded maxim of free government; namely, That in a ſtate ſo conſtituted, the legiſlative power, and the judicial power, muſt be lodged in ſeparate hands, and muſt in no reſpect interfere with each other, in the diſtinct matters of buſineſs aſſigned to them; for, whether the legiſlative encroaches upon the judicial, or the judicial encroaches upon the legiſlative, the conſequence is the ſame—the rights of the people are invaded, and the conſtitution is ſubverted. Law, written Law, is the ſtability of the Crown, and the ſecurity and happineſs of the Britiſh ſubject.

The attempt which has been made to introduce this mode of determination into our Courts of Common Law, ſeems to have been

been owing to the inſtitution of Courts of Equity, whoſe province it is to control the Law, and to determine matters of diſputed property by the rules of equity and good conſcience. In regard to the Court of Exchequer, although it is a Court of Equity as well as of Law, it is not qualified, by its appointments, to receive buſineſs of that kind to any extent. The conſtitution of the Court of Chancery is more ſtudiouſly framed for that purpoſe; and it is well known that buſineſs has for ſeveral years paſt flowed into it in great abundance, and cauſes of conſiderable conſequence are daily determined there. Now it often happens, that thoſe Counſel who have ſpent the greateſt part of their time in that Court, and who have arrived at the firſt degree of eminence in that branch of the profeſſion, are called upon to plead in our Courts of Common Law. It is natural for men ſo trained, to retain and carry along with them that liberality of ſentiment, thoſe conſcientious and equitable rules of deciſion, which they have been accuſtomed to; and it is no great wonder if, in this change of ſituation, they ſhould now and then depart from the Law, which oftentimes leans hard on the Suitors of thoſe Courts, and ſhould labour to obtain a milder, and more equitable determination: nor is it greater matter of ſurpriſe, that thoſe Counſel who ſpend their

whole time in the Courts of Common Law, and of Criminal Judicature, ſhould follow the example of theſe their learned brethren, and ſhould fall into a mode of pleading which is oftentimes not only ſatisfactory to their particular Clients, but ſecures to them the admiration of the uninformed multitude.

Had England been a free nation at the time when it became the great object of government to control the Law, and to moderate its rigor, the matter would have taken a different turn; the Law would have ſtood uncontroled by any power except that of the people, in conjunction with the King and the Houſe of Peers; and the rigor of it would, by proper Statutes, have been moderated from time to time, as freſh inſtances preſented themſelves, and pointed out the neceſſity of ſuch alterations. Had that method been purſued, and had the Statutes for that purpoſe made been ſtrictly adhered to by the Courts of Juſtice, the greater part by far of the litigation which has ſince ariſen would have been avoided, and numbers of unhappy families would have been ſaved from ruin: but the faſhion of the times directed otherwiſe.

It was thought proper to appoint ſome great man, a favorite of the Crown, placed and to be diſplaced at the King's pleaſure, to take upon him the high concern of controling the rigor of

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the Law, and of determining Civil Cafes by the rules of equity and good conſcience; or, in other words, it was his buſineſs to control the Law ſo far as he thought proper and conſiſtent with public good, for the purpoſe of adminiſtering more complete juſtice in ſuch private matters of diſputed property as ſhould at any time come before him. No letter to guide him; no boundary marked out for him: nothing had he to truſt to but his extenſive knowledge of human dealings; his ability to examine into the juſtice of every claim which ſhould be ſet up by each particular Suitor, and his foreſight in regard to the general effects which his determinations would have on the peace, harmony, and well-being of the community thus committed to his care. Arduous was indeed the taſk, and great were the difficulties which he and his ſucceſſors were appointed to encounter; nevertheleſs, many excellent rules of deciſion have been laid down, and many well-founded precedents are to be met with in the Books: but, as no line can be drawn ſufficiently limiting the power of this Court, and marking out how far the Law may be controled, conſiſtently with public good, in every particular caſe that happens to come before them, doubts and difficulties have frequently ariſen, and many of their Decrees have been reverſed by the Houſe of Peers: ſome, becauſe they

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they have controled the Law more; and ſome becauſe they have controled it leſs, than in the opinion of their Lordſhips, they ought to have done. And every man muſt perceive, at firſt ſight, that it is impoſſible it could have happened otherwiſe; as the difficulties here ſpoken of, are inherent in the eſſence of the inſtitution itſelf.———It is moſt probable that, in ſome future time, all the approved rules of equity will be formed into one or more Statutes, and the determinations of that Court will be controled by the apparent intention of the Legiſlature, expreſſed by the Letter of thoſe Statutes.

Having had occaſion to mention the Court of Chancery, I am induced to make one further obſervation upon it.———The ſame arbitrary power which appointed that mode of determining Civil Caſes, appointed alſo the mode of examining Witneſſes in that Court; a mode of examination unknown to the Common Law, and ſuch as a free people would not have inſtituted. Would a nation, ſo circumſtanced, have conſented that evidence taken in a corner, in the abſence of the adverſe Party, written down by one inferior Officer of the Court, then tranſcribed by another, ſhould be received in preference to evidence given *viva voce*, when the Witneſs comes forth into open Court, and confronts the Party againſt whom he bears teſtimony?

The imperfect method practiſed in this Court, of taking the examination of Witneſſes in London, is pointed out and obſerved upon in a Sixpenny Pamphlet, entitled, *A Matter of Moment*, and lately publiſhed by Corrall, in Catharine-ſtreet. In regard to their method of examining Witneſſes in the Country, which is indeed leſs objectable to, the Writer is ſilent: I ſay leſs objectable to, becauſe the Witneſſes who are examined in London are examined by a ſingle perſon, an inferior Officer of the Court; and thoſe in the Country are examined by a Commiſſion directed to Four Commiſſioners, the Parties on each ſide naming Two.

All the ſeveral reaſons that induced Government to appoint written evidence to be received in that Court, it is not expedient to enquire into; but there is one reaſon now ſubſiſting, which makes the continuance of this cuſtom ſtill neceſſary, unleſs other Regulations were at the ſame time introduced: for as that Court is not itinerant, being always held in London, the bringing of Witneſſes from the diſtant parts of England, on every common occaſion, to be examined in London, would be extremely inconvenient to the Witneſſes, and expenſive to the Parties; but as, by a Commiſſion which lately paſſed the Great Seal, any of the Judges are now impowered to preſide in that Court, and to determine

Cauſes in the abſence of the Chancellor, it ſhould ſeem, that Caſes in Equity, ariſing in the Country, might be tried at the Aſſizes, as well as Law-Caſes, and then the mode of giving evidence *viva voce* might be eſtabliſhed in the Court of Chancery in like manner as it is in the Courts of Common Law, and of Criminal Judicature.——But, to return to the conſideration of thoſe Courts——

Should the people of England cheriſh in their minds this idea of eſſential juſtice, and ſhould they be conſenting that a power of judicature, uncontroled by Law, ſhould be lodged in thoſe whoſe province it is to adminiſter juſtice, either as Judges or as Jurors in our Courts of Common Law, or of Criminal Judicature, they will, by that conſent, ſubmit themſelves to ſlavery—a kind of ſlavery unknown to thoſe governments which we call arbitrary: for the power of all ſuch governments is more or leſs limited by Laws, and thoſe Laws are ſtrictly adhered to. The tyranny of the Eaſt is not unbounded: although the Laws of Turkey give great latitude to the will of the ſovereign, and he and his Miniſters may exerciſe cruelties, and commit murders innumerable, yet no Baſhaw, nor even the Grand Signior himſelf, dares ſtrike off a ſingle head contrary to Law. Another circumſtance that would

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make a ſlavery of this kind the more intolerable, is, that it would engage us in the ſervice of many maſters.—The enſlaved ſubject of a powerful prince may live in ſafety; he may inform himſelf of the will of his ſovereign, and may fulfill it: but, under a multitude of tyrants, no ſuch information can be had, no ſafety can be inſured.

There is nothing that denotes diſſipation in a free people more than their inattention to the Laws, and to the preſervation of them in their original and native purity; and it is with great pleaſure that every man who turns his thoughts that way, obſerves ſome of our young Nobility at this time manifeſting a more than ordinary attention to ſuch matters of Law as occaſionally come before their auguſt Aſſembly. It is to be wiſhed that this truly patriotic example may be followed by the riſing generation, not only of our Nobles but of our Gentry; and for the purpoſe of encouraging ſuch young perſons as may be ſo inclined, it ſhould ſeem, that a plan of Regulations might be formed and introduced into our Univerſities, and that by Lectures, and other eaſy means, the ſtudents might, during their ſtay there, gain ſome little inſight into the Laws of their country. Being thus initiated, if, after quitting thoſe ſeats of learning, they would now and then attend

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the Courts of Juſtice, which might eaſily be made commodious and capable of receiving them, there is no doubt but that many of them would acquire ſuch a degree of knowledge as would enable them to maſter any particular point of Law which might occaſionally offer itſelf to their conſideration, ſo as to debate it, or write upon it with preciſion. We ſhould then have men of liberal education, of independent fortunes, and of high rank, conſtantly watching over the Laws, preventing any undue extenſion of the judicial power, and keeping it within thoſe bounds which the nature of free government has aſſigned to it. No apprehenſions of the kind above-mentioned will then remain in the breaſt of any man; the idea of eſſential juſtice will be for ever baniſhed from our Courts; and we may reſt ſecure, that all matters of life, liberty and property, will be adjudged by known and written Laws. Other, many other advantages would be derived from ſuch an Inſtitution; but, as they relate to matters leſs important than the preſent ſubject, they cannot, with propriety, be made a part of this Eſſay.

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